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No. ——

IN THE
Supreme Court of the United States

LABORERS' INTERNATIONAL UNION OF NORTH AMERICA,
Petitioner,
v.
DAVINE ALEXANDER, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether—on either of the following legal theories—an international union that is not "involved" in administering an affiliated local union's employment referral system, or in directing the local's administration of the system, is liable under 42 U.S.C. § 1981/Title VII of the Civil Rights Act of 1964 for the local's discriminatory employment referral practices by reason of the international's "neglect" to "investigate" and to "remedy" allegations of the local's discrimination:

1. Section 1981/Title VII impose an "affirmative duty" on international unions to investigate and to remedy allegations of affiliated local union discriminatory employment practices, and the neglect to conduct such an investigation and to effectuate such a remedy constitutes a breach of that "affirmative duty";

2. Section 1981/Title VII agency law principles provide that an international union's "acquiescence" in an affiliated local union's discriminatory employment practices makes the international vicariously liable for the local's discrimination, and an international's neglect to investigate and to remedy allegations of a local's discrimination constitutes "acquiescence."

PARTIES TO THE PROCEEDING

In addition to the Laborers' International Union of North America (a defendant in this case and the petitioner herein), the parties to this proceeding are:

(a) The plaintiffs in the case (and the respondents herein):

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Arthur Bryant
James D. Carson
Craig Clinton
Lee N. Coffee, Sr.
Ronald Colvin
Arthur L. Cook
Samuel D. Cook
Willie A. Edge
Alfred Edwards
Leon Edwards, Sr.
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Daniel O. Enoch
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Edward R. Gant
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Lamont A. Jackson
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Edward Turner II
Donald Waytes
Damon L. Wilburn
Dolores J. Williams
Willie Wright

(b) Local 496, Laborers' International Union of North America (a defendant in the case).

(c) Floyd B. Conrad (a defendant in the case).

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Respondents.

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PETITION FOR A WRIT OF CERTIORARI

The Laborers' International Union of North America, AFL-CIO, petitions this Court for a writ of certiorari to the United States Court of Appeals for the Sixth Circuit to review the judgment and decision in *Alexander v. Local 496, Laborers' International Union of North America, et al.*, 6th Cir. Nos. 96-3806/3823/3854/3857/3858 (April 30, 1999).

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 177 F.3d 394, and is reproduced as Appendix A in the separately bound appendix to this *certiorari* petition. Pet. App. 1a-65a. The liability opinion of the United States District Court for the Northern District of Ohio is reported at 778 F. Supp. 1401 and is reproduced as Appen-

dix B hereto. Pet. App. 66a-108a. The order of the Court of Appeals denying rehearing and rehearing *en banc* is unreported, and is reproduced as Appendix C hereto. Pet. App. 109a-110a.

JURISDICTION

The Sixth Circuit issued its decision and judgment on April 30, 1999. The Court of Appeals issued its order denying a timely petition for rehearing and rehearing *en banc* on June 30, 1999. Through an order by Justice Stevens, petitioner was granted an extension of time through and including October 28, 1999 to file the instant *certiorari* petition. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254.

STATUTORY PROVISIONS INVOLVED

42 U.S.C. § 1981 provides that "[a]ll persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishments, pains, penalties, taxes, licenses and exactions of every kind, and to no other."

Title VII of the Civil Rights Act of 1964 defines the term labor organization as "a labor organization engaged in an industry affecting commerce, and any agent of such an organization," 42 U.S.C. § 2000e(d), and provides, in pertinent part, that "[i]t shall be an unlawful employment practice for a labor organization . . . to classify or fail or refuse to refer for employment any individual . . . because of such individual's race, color, religion, sex, or national origin," 42 U.S.C. § 2000e-2(c)(2).

STATEMENT OF THE CASE

A. Factual Background

This 42 U.S.C. § 1981/Title VII of the Civil Rights Act of 1964 class action concerns employment on the Perry Nuclear Power Plant, Lake County, Ohio ("Perry") project. Plaintiffs in the District Court and respondents here are Davine Alexander *et al.*, and defendants in the District Court are the petitioner Laborers' International Union of North America, AFL-CIO ("LIUNA" or "International Union"), Local Union 496—one of 621 local unions affiliated with LIUNA—and Local 496's chief officer, Floyd Conrad.

As is true of each of the LIUNA affiliated local unions, Local 496 is a legally-separate entity which elects its own officers, maintains its own treasury, files its own labor organization reports required by the Labor Management Reporting and Disclosure Act with the Department of Labor, *see* 29 U.S.C. § 431, and conducts its own day-to-day operations. Individual workers become members of local unions affiliated with LIUNA and of LIUNA itself by joining a LIUNA local union in the area where the individual is employed. Members thereafter pay dues to their LIUNA local union to maintain their membership in good standing. The LIUNA local union, in turn, pays from these membership dues a monthly "per capita tax" to the International Union based on the number of members in good standing in the local.

The Perry Nuclear Plant project proceeded in two phases: a construction phase from 1973-1985 and an ongoing maintenance phase thereafter. The Perry construction was effectuated through a "PLA"—a project labor agreement between the plant owner, its contractors and a set of local unions representing construction workers—to which Local 496 was a signatory as one of two

local unions in the Lake County area that represents laborers. With regard to hiring the PLA provided:

> Contractors . . . shall . . . utilize the . . . referral systems operated by the Local Unions in accordance with the provisions of applicable Federal and State laws.
>
> The selection of applicants . . . shall be on a non-discriminatory basis and shall not be based on, or in any way affected by, union membership, bylaws, rules, regulations, constitutional provisions, or any other aspect of union membership, policies, or requirements. [Pet. App. 36a n.3 (Batchelder, J., dissenting).]

LIUNA was *not* a party to the PLA. And, LIUNA had *no* role in administering the Local 496 exclusive employment referral system provided for therein. Pet. App. 5a; *id.* at 58a, 60a-62a (Batchelder, J., dissenting).

The Local 496 Constitution—which follows LIUNA's model constitution for affiliated local unions—contains a "working-at-the-calling" rule under which prior employment as a laborer in Lake County is a condition for union membership. The PLA—by obligating the Local to make referrals to Perry on a nondiscriminatory basis and without regard to union membership—effected a "waiver" of that rule with regard to such referrals. Pet. App. 4a; *id.* at 36a (Batchelder, J., dissenting).[1]

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[1] Although both the majority opinion and the dissent below use the term "waiver" to describe the effect that the PLA had on the "working-at-the-calling" rule, it would be more precise to say that the PLA made express what is true in all events—that the "working-at-the-calling" rule is a rule of limited scope that has no application to and no operative role with regard to local union exclusive referral systems or to a laborer's eligibility for a referral. The PLA made this express by its provision precluding Local 496 *from taking*

Each plaintiff is an African-American and a non-member of Local 496 who attempted unsuccessfully to obtain a referral through the Local for a Perry construction phase laborer's job. In 1984-85, plaintiffs filed a series of charges against Local 496 with the Equal Employment Opportunity Commission ("EEOC") alleging that the Local had violated Title VII by making Perry referrals on a racially discriminatory basis. LIUNA was not named as a respondent in these EEOC charges, but was provided copies thereof. Pet. App. 6a; *id.* at 34a (Batchelder, J., dissenting).

At the end of the Perry project's construction phase and in a transition to its ongoing maintenance phase, the PLA was replaced by a set of national maintenance agreements between the national and international unions representing construction/maintenance workers, the plant owner and its maintenance contractors. The LIUNA Maintenance Agreement incorporated the hiring provision of the predecessor PLA by providing that the maintenance contractors would hire "in accordance with the hiring procedure existing in the territory." Pet. App. 58a (Batchelder, J., dissenting). Under the Maintenance Agreement—as under the PLA—Local 496 administered its exclusive Perry referral system on its own and "[n]o LIUNA representatives or agents were involved." Pet. App. 5a.

B. The District Court Decision

In December 1984, plaintiffs sued Local 496 and its chief officer, Floyd Conrad, alleging that the Local and Conrad had discriminated on the basis of race in administering the Local's referral system. Over four years later, in September 1989, plaintiffs filed charges against

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membership status into account in referring laborers for work on the Perry project.

LIUNA with the EEOC, "alleging that LIUNA had intentionally neglected to investigate their charges of discrimination against the other defendants." Pet. App. 7a; *see also id.* at 34 (Batchelder, J., disenting). And, in January 1990, plaintiffs sought and were given leave to add LIUNA as a defendant herein, over the International Union's objection, *inter alia*, that any action against LIUNA was time-barred. Pet. App. 7a.

The District Court found that Local 496 and Conrad had, in violation of both § 1981 and Title VII, discriminated on the basis of race in administering the Local 496 referral system and that the Local and Conrad thus were liable in damages for plaintiffs' loss of Perry employment opportunities.

In addition, the District Court found LIUNA liable together with Local 496 and Conrad for the employment referral discrimination against the plaintiff class, "under two different legal theories." Pet. App. 104a. The District Court's first liability theory was that Local 496 "was acting as agent of the International Union" when the Local engaged in the discriminatory practices found, thus rendering the International Union *vicariously* liable for those practices. Pet. App. 104a. And, the District Court's second liability theory was that the International Union had "violated an affirmative duty under Title VII and § 1981 to oppose [the] discriminatory practices of Local 496," thus rendering the International Union *directly* liable for those practices. Pet. App. 104a.

The District Court's ruling that LIUNA is liable under these two legal theories was grounded on the following proposition: that throughout the relevant period LIUNA and Local 496 were affiliated labor organizations; that, for part of that period, LIUNA was a party to the Maintenance Agreement which provided for an exclusive re-

ferral system; *and* that LIUNA did not—after notice of the plaintiffs' claim that Local 496 and Conrad had administered the Local's referral system in a discriminatory manner—intervene to correct and to prevent Local 496's discrimination in its administration of its referral system. Pet. App. 105a-106a. That proposition supported the LIUNA *vicarious* liability, according to the District Court, because the International Union's inaction showed International Union "acquiesc[ence]" to Local 496's discriminatory practices. Pet. App. 105a. And, that proposition supported the LIUNA *direct* liability, according to the District Court, because the International Union's failure to intervene to correct and prevent Local 496's discriminatory practices constituted a breach of its "affirmative duty to oppose the discriminatory practices of Local 496." Pet. App. 105a.[2]

C. The Sixth Circuit Decision

The District Court's judgment against Local 496 and Conrad was affirmed by the Sixth Circuit panel below—Circuit Judges Batchelder and Cole and Senior Circuit Judge Keith—albeit in two separate opinions, one by Judge Cole joined by Judge Keith and one by Judge Batchelder. The judgment against LIUNA likewise was affirmed, but this time with Judge Batchelder in dissent. Pet. App. 22a-25a; *id.* at 57a-65a (Batchelder, J., dissenting).

The panel majority affirmed the District Court's ruling "that LIUNA is liable *both* vicariously and directly."

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[2] The amount of the damages assessed against Local 496 and LIUNA is—by the terms of a partial settlement agreement subsequently entered into in the District Court—dependent on the outcome of appellate proceedings. Pet. App. 7a-8a. "The parties also [have] agreed to a system by which Local 496 w[ill] give plaintiffs preference in employment referrals." Pet. App. 8a.

Pet. App. 23a (emphasis added). Following the District Court's lead, the panel majority predicated the imposition of liability on both legal theories on LIUNA's "neglect[] to remedy the alleged discrimination when it learned of the plaintiffs' claims." Pet. App. 22a. As the panel majority put it in concluding its discussion on the International Union's liability, "LIUNA was aware and on notice of the charges of discrimination filed against Local 496, as Floyd Conrad and the EEOC both informed LIUNA personnel of such developments. Thus the international cannot feign ignorance, and cannot be excused for breaching its duty to end Local 496's discrimination." Pet. App. 24a.[3]

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[3] The District Court's vicarious liability rationale is the very model of concise lucidity: "Because the Court finds that the International Union was aware of the discriminatory actions of Local 496 and Floyd Conrad both before and after March 1985 regarding refusing to make referrals to class members or permitting them to become union members and further finds that the International Union acquiesced in those actions, the Court finds for class members in their claims against the International Union." Pet. App. 105a.

The panel majority's rationale is not. We summarize it as we do in text by reason of the following. The panel majority affirmed the District Court's vicarious liability findings and conclusions and the panel majority's decision sets out its basis for that affirmance. In so doing the panel majority concludes its vicarious liability discussion by paraphrasing the District Court's rationale just quoted. And, as a matter of settled law and of the facts as stated by the panel majority, the intermediate points made in the majority opinion —that the 1985 Maintenance Agreement provided for an exclusive referral system and that the model local union constitution prescribed by LIUNA contains a "working-at-the-calling" rule—taken alone or in conjunction afford no basis for holding the International Union vicariously liable. *See infra* pp. 22-24. It follows, we believe, that the crux of the panel majority's vicarious liability ruling—like that of the District Court's ruling—is LIUNA's "neglect to remedy" Local 496's alleged discriminatory employment practices.

Judge Batchelder, in her dissent, found no basis for imposing liability upon LIUNA on *either* a vicarious liability theory *or* on a direct liability theory.

As to the vicarious liability theory, Judge Batchelder concluded that the District Court's findings, and the underlying record evidence, "reflect nothing more than mere 'acquiescence' " by the International Union, Pet. App. 61a, and that "[c]ontrary to the statements of the district court, mere 'acquiescence' is not enough" to support the imposition of vicarious liability under the applicable § 1981 and Title VII precedents. Pet. App. 60a.

As to the direct liability theory, Judge Batchelder began by noting that in *General Bldg. Contractors v. United Eng'rs & Constr.*, 458 U.S. 375 (1982), this Court had squarely ruled that § 1981 does not create any third person affirmative duty to prevent discrimination by others, and then concluded that Title VII likewise creates no such affirmative duty—citing, *inter alia*, Justice Powell's concurring and dissenting opinion (joined by Justices O'Connor and Scalia) in *Goodman v. Lukens Steel Co.*, 482 U.S. 656, 687-89 (1987). Pet. App. 63a-65a & n.18.[4]

REASONS FOR GRANTING THE WRIT

The Court of Appeals' decision in this case—which is contrary to decisions of this Court and of other Courts of Appeals—reworks the 42 U.S.C. § 1981/Title VII of

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[4] The panel majority also affirmed the District Court's rejection of LIUNA's statute of limitations defense. *See* Pet. App. 18-22. Because Judge Batchelder would have found non-liability on other grounds, she did not reach that issue in her dissent. Petitioner does *not* seek review of that statute-of-limitations ruling here. Although we believe that ruling to have been in error, we recognize that the error was largely in the misapplication of well-established law to the facts and that such errors do not provide a proper basis for review on *certiorari*.

the Civil Rights Act of 1964 scheme of prohibitions and liabilities in a fundamental regard and with profound consequences.

These anti-discrimination laws, on their face and as construed by this Court, (i) prohibit employers and unions from engaging in discriminatory practices in making employment decisions and in taking employment actions; and (ii) impose liability on employers/unions that do engage in such discriminatory employment practices.

On the decision below, however, § 1981/Title VII go well beyond imposing first person duties and providing for first person liabilities for breaches of those duties. According to the Court of Appeals, § 1981/Title VII enact as well *a third person duty and a corresponding third person liability*—a third person duty to intervene to correct and prevent first person discriminatory employment practices and a third person liability for the first person discrimination that the third person did not correct and prevent.

The Court of Appeals' "direct [LIUNA] liability" ruling here—that LIUNA "breach[ed] its duty to end [an affiliated local union's] discrimination" by "neglecting to remedy [that] alleged discrimination when it learned of the plaintiff's claims"—adds to the local union's duty not to engage in discriminatory employment practices stated in § 1981/Title VII, an affirmative international union duty to intervene so as to correct and to prevent an affiliated local union's discriminatory employment practices nowhere stated in § 1981/Title VII.

And, in both legal and practical terms the Court of Appeals' "vicarious liability" ruling—predicated on LIUNA's "neglect to remedy [Local 496's] alleged discrimination when it learned of the plaintiffs' claims" that the Local

was engaging in discriminatory employment practices—is to the same effect as its "direct liability" ruling. On *both* liability theories the determinant of an international union's § 1981/Title VII liability is the international's failure to act to correct and to prevent a local union's discriminatory employment practices—*not* any international union action constituting a discriminatory employment practice.

The Court of Appeals' "affirmative duty" theory has no root in the employer/union duties stated in § 1981/Title VII—as far reaching as those are. Nor, so far as we are aware, is there any root for any such "affirmative duty" theory in any of the array of federal employment and anti-discrimination laws. And, the Court of Appeals' "neglect to remedy" vicarious liability theory is equally foreign to the federal common law of agency as stated by this Court in *Coronado Coal Co. v. United Mine Workers*, 268 U.S. 295 (1925), and its progeny.

The Court of Appeals' rulings, moreover, do not spend themselves in the expansion of § 1981's/Title VII's prohibitions—those rulings have the most far-reaching effect on § 1981/Title VII liabilities. All but a handful of the thousands of local unions covered by § 1981/Title VII are separate legal persons affiliated with national and international unions that are, in their turn, separate legal persons. By the same token, thousands of the corporations covered by § 1981/Title VII are subsidiaries of other corporations and thousands of the employer associations covered by § 1981/Title VII are affiliated with national employer associations.

Under the Court of Appeals' rulings here, any local union discriminatory action that an international union with "notice" fails to intervene to correct and to prevent generates both a local union liability and an international union liability—and not a local union liability alone.

And, while the Court of Appeals did not opine on the point, there is nothing in § 1981/Title VII or in the law of agency that could possibly justify a different result in the subsidiary corporation-parent corporation context or in the affiliated employer association context.

In the run of cases, then, § 1981/Title VII litigation would no longer be focused on a union's/employer's allegedly discriminatory employment practices, it would be about that *and* about the nature of the notice to a related union/employer and about the nature and quality of that third person defendant's intervention to prevent the first person defendant's alleged discriminatory practices.

Given all this, the Court of Appeals' "affirmative duty" direct liability ruling plainly raises an anti-discrimination law question of the first magnitude. And, it is equally plain that this question is one that calls for this Court's review. The Court—in recognition of the importance of the "affirmative duty" theory to the proper development of the anti-discrimination law—has twice taken cases raising cognate "affirmative duty" questions. *General Bldg. Contractors v. United Eng'rs & Constr.*, 458 U.S. 375 (1982); *Goodman v. Lukens Steel Co.*, 482 U.S. 656 (1987). But in the event, neither *General Builders* nor *Goodman* provide a complete and definitive answer to the "§ 1981/Title VII affirmative duty" question presented here.

This question therefore remains an open one in this Court and a question that throws a large shadow of uncertainty over § 1981/Title VII law and over the litigation of § 1981/Title VII cases. That is so even though both the Court's *General Builder's* opinion and Justice Powell's *Goodman* opinion cut deeply—and, we believe, decisively—against the Court of Appeals' "affirmative duty" theory. And, that is so even though this Court and the Courts of Appeals have uniformly rejected attempts to

interject "affirmative duty" concepts into the federal labor relations statutes.

For precisely the same reasons, the Court of Appeals' "neglect to remedy" vicarious liability ruling raises a § 1981/Title VII agency law question of equal moment. It is particularly to the point that this ruling cannot be squared with the federal common law agency principles this Court has stated in its *Coronado Coal* line of precedent and that the Court of Appeals' decision in this regard is in conflict with every other Court of Appeals' § 1981/Title VII vicarious liability decision.

It is equally to the point that in light of their brigaded nature complete and considered review of the Court of Appeals' "affirmative duty" direct liability ruling all but requires simultaneous review of its "neglect to remedy" vicarious liability ruling. While the former is stated in substantive law terms and the latter in agency law terms both rest on the proposition that there is a legal duty on an international union with "notice" to intervene in the affairs of an affiliated local union to correct and to prevent the local union's alleged discriminatory employment practices and an attendant international union liability for the local union's discriminatory practices. Thus, both rulings rest on a single major premise and are so closely intertwined in the development of that premise as to be variations on a single theme. For all legal intents and purposes these two rulings raise a single question that calls for a single answer.

I. THE COURT OF APPEALS' DIRECT LIABILITY RULING

(a) The Court of Appeals' direct liability ruling here cannot be squared with this Court's *General Builders* decision or with Justice Powell's *Goodman* opinion (joined by Justices O'Connor and Scalia).

In *General Builders*, the lower courts found a group of employers and their trade associations liable under § 1981 for employment referral discrimination by a union with whom the employers/associations maintained a collective bargaining relationship. The lower courts there proceeded on the theory that the employers/associations had breached a "nondelegable duty . . . to see that discrimination does not take place in the selection of [their] workforce." 458 U.S. at 395. This Court rejected that theory:

> [I]n this litigation the question is not whether the employers and associations are free to delegate their duty to abide by § 1981, for whatever duty the statute imposes, they are bound to adhere to it. The question is *what* duty does § 1981 impose. More precisely, does § 1981 impose a duty to refrain from intentionally denying blacks the right to contract on the same basis as whites or does it impose an affirmative obligation to ensure that blacks enjoy such a right? The language of the statute does not speak in terms of duties. It merely declares specific rights held by "[a]ll persons within the jurisdiction of the United States." We are confident that the Thirty-ninth Congress meant to do no more than prohibit the employers and associations in these cases from intentionally depriving black workers of the rights enumerated in the statute, including the equal right to contract. *It did not intend to make them the guarantors of the workers' rights as against third parties who would infringe them.* [458 U.S. at 396 (first emphasis in original; second emphasis added).]

It is, we submit, equally true that Title VII, as its language and legislative history attest, prohibits unions (and employers) from "depriving black workers of the [equal employment] rights enumerated in the statute" and that Title VII does so without "mak[ing unions (or employers)] guarantors of the workers' rights as against

third parties who would infringe them." Indeed, Justice Powell's *Goodman* opinion (joined by Justices O'Connor and Scalia) comes to that conclusion.

In *Goodman*, the union *certiorari* petition rested on the "conten[tion] that the judgment against them rests on the erroneous legal premise that Title VII and § 1981 are violated if a union passively sits by and does not affirmatively oppose the employer's racially discriminatory employment practices." 482 U.S. at 665. The *Goodman* Court's opinion does not reach that contention on the ground that the true basis of the lower court's judgment there was that "the Unions had indeed discriminated on the basis of race by the way in which they represented the workers" in administering the contract grievance system and that this maladministration of the grievance system does constitute a violation of Title VII § 703(c)(1). *Id.* at 666-67.

At the same time Justice Powell, after noting his disagreement with that reading of the lower courts' decisions and the record, went on to "consider whether the judgment can be affirmed on the ground that Title VII imposes an affirmative duty on unions to combat discrimination by the employer." 482 U.S. at 687. Justice Powell answered that question "no."

Justice Powell began by showing that Title VII § 703(c)'s language "does not suggest that the union has a duty to take affirmative steps to remedy employer discrimination." 482 U.S. at 687. And, Justice Powell added that reading such an affirmative duty into Title VII would "disrupt the basic policies of the labor laws" which, *inter alia*, rest on the premise that unions, "[l]ike other representative entities . . . must balance the competing claims of its constituents . . . [and] make difficult choices among goals such as eliminating racial discrimination in the

workplace, removing health and safety hazards, providing better insurance and pension benefits, and increasing wages." *Id.* 688-89.

Justice Powell's reasoning exposes the fatal flaws in the Court of Appeals' "affirmative Title VII duty" ruling here.

First, although "[t]he starting point for analysis of this statutory question is, as always, the language of the statute itself," *Goodman*, 482 U.S. at 687 (Powell, J.), the panel majority did not even purport to cite Title VII language that would support the imposition on international unions of an "affirmative duty" to remedy alleged discrimination by their affiliated local unions. This was no mere oversight because Title VII contains no such language. By its plain terms, Title VII § 703(c) imposes liability on unions that engage in certain enumerated "unlawful employment practices," and nowhere in that enumeration does there appear the failure to police and remedy discrimination by affiliated unions or other third parties. *Cf. Goodman*, 482 U.S. at 687-88 (Powell, J.).

Second, "[i]n the absence of a clear statement of legislative intent, th[is] Court has been reluctant to read Title VII to disrupt the basic policies of the labor laws." *Id.* at 688. As the trusteeship provisions of the Labor-Management Relations Act reflect, one of those basic policies is the preservation of local union autonomy. *See* 29 U.S.C. §§ 461-466; *see also* Pet. App. 64a n.18 (Batchelder, J., dissenting). That policy unquestionably would be disrupted if Title VII were to be given the construction adopted by the panel majority. *Goodman*, 482 U.S. at 688-89 (Powell, J.).[5]

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[5] In this connection, it is notable that the court below gave no consideration whatsoever to the means by which international unions are to fulfill their affirmative § 1981/Title VII duty to "remedy" alleged discrimination by affiliated local unions. If a local union did

Third, in the absence of a statutory-language predicate for the imposition of an "affirmative duty" on international unions to remedy alleged discrimination by their local union affiliates, the panel majority resorted to the policy argument that such an imposition is necessary to vindicate Title VII's broad remedial purposes, inasmuch as local unions would, in the majority's view, have a "question-[able] . . . incentive . . . to comply with anti-discrimination statutes when they face no threat of sanction, or even investigation, by their parent union." Pet. App. 24a n.8.

To begin with, that remedial concern is wholly illusory, because local unions are themselves subject to "direct" Title VII liability if they engage in discrimination violative of that statute, as the instant case itself amply demonstrates. *Cf. Goodman*, 482 U.S. at 689 (the failure to recognize an affirmative duty on the part of a labor union to remedy employer discrimination would not leave the employee "without a remedy, because union members may file Title VII actions directly against their employers") (Powell, J.).

But even if that remedial concern were real, it is Congress' and *not* the federal courts' role to craft an appropriate solution, whether it be stiffer penalties for Title VII

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not immediately adopt the international union's "remedy" and follow its terms the international could only effectuate such a "remedy" by placing the local union in trusteeship and assuming its day-to-day operations. Congress, however, has provided in the Labor Management Reporting and Disclosure Act that a local union subjected to a trusteeship has the right, *inter alia*, to a "fair hearing" in which it is apprised of the allegations against it and given an opportunity to defend against those allegations. 29 U.S.C. § 464. Thus, if the local union contested the discrimination claims, international unions would be required to conduct "mini-§ 1981/Title VII trials" in order to address the merits of those claims—presumably without regard for whether those claims were the subject of an EEOC or court proceeding.

violations, enhancement of the EEOC's enforcement powers and resources, or imposition of the "affirmative duty" posited by the courts below. *Cf. Carbon Fuel Co. v. United Mine Workers*, 444 U.S. 213, 218 (1979) ("[W]e reject petitioner's suggestion that Congress' policy in favor of arbitration extends to imposing an obligation on the respondent[] [international union], which agreed to arbitrate grievances [under a collective bargaining agreement], to use reasonable means to try to control [its affiliated] locals' actions in contravention of that agreement.").

(b) Given all this it is hardly surprising that in the context of local union actions in violation of the federal labor relations statutes, both *this* Court and *every* Court of Appeals presented with an "affirmative duty" claim—including the Sixth Circuit itself—has rejected that claim. *See Carbon Fuel*, 444 U.S. at 213, 217-18 (an international union has no affirmative duty to "use all reasonable means available to it to prevent [unlawful 'wildcat'] strikes [by affiliated local unions] or bring about their termination"); *Phelan v. Local 305, United Ass'n*, 973 F.2d 1050, 1061 (2d Cir. 1992) ("An international union has no independent duty to intervene in the affairs of its local chapters, even where the international has knowledge of the local's unlawful acts"), *cert. denied*, 507 U.S. 972 (1993); *Brenner v. Local 514, UBC*, 927 F.2d 1283, 1292 (3d Cir. 1991) (an international union has no "legal obligation to "intervene to rectify . . . possible abuse[s] by [its affiliated] locals"); *R.E. Chapa v. Local 18*, 737 F.2d 929, 932 (11th Cir. 1984) ("mere constructive knowledge of possible illegal activity on the local level" does not suffice "to impose a legal duty to intervene on the national union"); *Shimman v. Frank*, 625 F.2d 80, 99 (6th Cir. 1980) (refusing to impose on international unions "a duty to oversee and correct . . . anti-

dissident abuses" at the local union level; "[o]therwise, [i]nternational [u]nions could be destroyed by liability findings based on a hindsight analysis of what they should have done").

In sum, the panel majority's "§1981/Title VII affirmative duty" holding flies in the face of the statutory language, this Court's § 1981 case law, and the general federal employment and labor statutes case law.

II. THE COURT OF APPEALS' VICARIOUS LIABILITY RULING

The most basic rule of the common law of agency and the rule that guided the Court in the *Coronado Coal* case is this: one legal person with the "right to control" the conduct of a second legal person's affairs—such as an international union vis-a-vis affiliated local unions and a parent corporation vis-a-vis subsidiary corporations—that does not take action to exercise that right is *not* vicariously liable for the second legal person's wrongful actions. It follows that nothing in the law of agency imposes any duty on an international union/parent corporation to exercise its residual right to control the conduct of an affiliated local union's/subsidiary corporation's affairs or any vicarious liability on the international union/parent corporation by reason of the non-exercise of that right.

The courts below took a contrary view. The District Court predicated LIUNA's vicarious liability here squarely on the Internation Union's "acquiescence" in the form of LIUNA's failure to take action to intervene in Local 496's affairs to "oppose" and to "correct[]" the Local's discriminatory employment practices. Pet. App. 104a-106a. And, the Court of Appeals, in affirming the District Court's vicarious liability ruling, predicated that liability on LIUNA's "neglect[]" in "remedy[ing] the al-

leged discrimination when it learned of the plaintiffs' claims" Pet. App. 22a; *see also supra* pp. 7-8 and note 3.

This grounding of vicarious § 1981/Title VII liability on international union inaction where there are claims that a local union is engaging in discriminatory employment practices is in conflict with *every* other Court of Appeals' decision in point, as well as this Court's decisions delineating the governing common law agency principles.

(a) The D.C. Circuit in *Berger v. Iron Workers Local 201*, 843 F.2d 1395 (D.C. Cir. 1988), and Judge Batchelder in her dissenting opinion below, canvas the relevant Court of Appeals' decisions and we therefore restrict ourselves to summarizing the most salient points.

(i) In *Berger*, the D.C. Circuit, after discussing the Court of Appeals' decisions to that point, concluded *first*, that vicarious § 1981/Title VII liability is grounded in the common law of agency, 843 F.2d at 1427-1428; *second*, that such liability must be based "on something more than the abstract and unbounded premise that the entities regulated by those laws have an 'affirmative duty' to end discrimination," *id.* at 1429; and *third*, that the decisive factor is whether the international union was actively " 'involv[ed]' " in the affiliated local union discriminatory employment practices in question, *id.* at 1428 (quoting *Sinyard v. Foote & Davies*, 577 F.2d 943, 945 (5th Cir. 1978)).

Thus, the *Berger* court explained, the Fifth Circuit in *Sinyard* had *rejected* the " 'blanket imposition of an affirmative duty on international unions to police their locals to insure nondiscriminaton,' " and had "*exonerate*[*d*] the international" of vicarious liability in the absence of any evidence that the international affirmatively " 'caused,' " " 'participated in' " or " 'approv[ed]' " the discrimination

complained of. 843 F.2d at 1428 (quoting *Sinyard*, 577 F.2d at 947) (emphasis added).

Conversely, vicarious liability had been imposed on the international union defendants in *Myers v. Gilman*, 544 F.2d 837 (5th Cir.), *cert. denied*, 434 U.S. 801 (1977); *Howard v. International Moulders & Allied Workers Union*, 779 F.2d 1546 (11th Cir.), *cert. denied*, 476 U.S. 1174 (1986); and *Kaplan v. International Alliance of Theatrical & Stage Employees*, 525 F.2d 1354 (9th Cir. 1975), on the basis of the international unions' active involvement in the negotiation of the discriminatory collective bargaining agreement provisions in question.[6]

Applying these legal principles to the matters before it, the *Berger* court found an international union vicariously liable for certain discriminatory membership practices by its local union affiliate, *see* 843 F.2d at 1405-1406, but *not* for the local union's job referral of one of the plaintiffs (Bellamy) at reduced wages in retaliation for Bellamy's complaints regarding the local's membership practices, *id.* at 1426. As to the former, the *Berger* court found that "the [i]nternational was involved with the membership practices of Local 201 to such an extent that the District Court could infer that the local is the agent of the international with respect to [those] practices." *Id. at* 1431. As to the latter, "[i]n contrast," there was "not a shred of evidence nor any finding by

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[6] In *Myers*, the international had " 'provided an advisor to the local in its negotiations and . . . approved the resultant collective bargaining agreement' " (quoting 544 F.2d at 851); in *Howard*, the international had " 'worked closely' with local negotiators, resulting in [the] discriminatory bargaining agreement" (quoting 779 F.2d at 1548); and in *Kaplan*, the international had both "negotiated and signed [the] discriminatory collective bargaining agreement" (citing 525 F.2d at 1360). *See Berger*, 843 F.2d at 1428.

the District Court linking the [i]nternational to Bellamy's wage cut." *Id.* at 1433.

(ii) In her dissenting opinion below, Judge Batchelder undertook the same review and analysis of the case law that the *Berger* court had undertaken—albeit with the benefit of *Berger* itself on the books—and concluded that "*Berger* aptly ties together the existing case law and sets forth the correct approach." Pet. App. 59a n.16.

Thus, Judge Batchelder agreed with the *Berger* court that the decisive factor in each case had been whether the international union had been "involved" in some affirmative matter in the discriminatory acts in question:

> In *Berger*, the court found an agency relationship because, in addition to the international union's constitutional provisions providing the international with oversight authority over the local's membership practices (*which alone would not be enough to find the agency relationship*, 843 F.2d at 1431), the international had formally endorsed the establishment of the discriminatory practice in question and was actually involved in its implementation. *Id.* at 1430-32. In the cases cited by Plaintiffs, the provisions in question were themselves discriminatory and were explicitly negotiated by the international. [Pet. App. 61a-62a (emphasis added).]

(b) The panel majority decision imposing vicarious § 1981/Title VII liability on LIUNA in the circumstances here presented is squarely in conflict with this otherwise unbroken line of Court of Appeals' decisions.

LIUNA has been mulcted with vicarious liability damages for Local 496's *racially-discriminatory administration* of the facially non-discriminatory employment referral system provided for by the PLA (and, subsequently, the Maintenance Agreement) governing the Perry project even

though, as the panel majority itself recognized, all decisions/actions respecting the administration of that referral system were made/taken by Local 496 officials, and "[*n*]*o LIUNA representatives or agents were involved.*" Pet. App. 5a (emphasis added). *See also id.* at 62a ("Plaintiffs have failed to present any evidence indicating that LIUNA supported or approved of Local 496's decision in fact not to comply with the PLA, or allegedly to make exceptions in their compliance for a number of white relative/friends.") (Batchelder, J., dissenting).

Simply put, it is a startling departure from the heretofore uniform Court of Appeals' law to find an international union vicariously liable for local union acts of discrimination in which the international was *not* "involved" in any way, shape or form. *Cf. Berger, supra,* 843 F.2d at 1433; *Sinyard, supra,* 577 F.2d at 947.

(c) Indeed, the panel majority treated international union involvement or non-involvement in Local 496's discriminatory employment practices as all but an irrelevance. The one exception is its reference to the constitutional working-at-the-calling rule, by which, said the panel, LIUNA "instigat[ed], support[ed], rati[fied] or encourag[ed]" the discriminatory acts of the Local. Pet. App. 24a. But the panel majority's own recognition that the constitutional working-at-the-calling rule was *inapplicable* here shows that this is an empty rhetorical flourish. The provision that governed the Local's referral system was the PLA hiring provision and *not* the constitutional working-at-the-calling provision. The former took precedence over the latter and by so doing limited the scope of—or, in the majority's phrase, "waived"—the latter. *See supra* p. 4 & note 1. The proposition that under the applicable agency law standard an international union is liable for an affiliated local

union's racially-discriminatory acts by reason of an *inapplicable* background union constitutional rule is one that falls of its own weight.

(d) This Court has not spoken to the § 1981/Title VII vicarious liability issue presented here. But the Court has given the most mature consideration to the applicable federal common law agency principles in the line of labor relations statute cases from *Coronado Coal* to *Carbon Fuel*. Those decisions, we submit, make it plain that the vicarious liability "acquiescence" theory of the courts below is entirely without substance.

Carbon Fuel involved an effort by the plaintiffs to hold the United Mine Workers of America vicariously liable under § 301 of the Labor Management Relations Act ("LMRA"), 29 U.S.C. § 185, for a series of unlawful "wildcat" strikes by its local union affiliates. In treating with this issue, the Court began by noting that Congress had adopted the common-law agency test for the imposition of vicarious liability under LMRA § 301. 444 U.S. at 216-17. The Court then went on to reaffirm Chief Justice Taft's *Coronado Coal* ruling "that to find the [international] union [vicariously] liable 'it must be clearly shown that what was done was done by their agents in accordance with their fundamental agreement of association.'" *Carbon Fuel*, 444 U.S. at 217 (quoting *Coronado Coal*, 268 U.S. at 304). And *Carbon Coal* concludes by making it clear that the *Coronado Coal* vicarious liability standard requires international union "authoriz[ation of], participat[ion] in, or ratifi[cation of]" the local unions' wrongful acts. *Id.* at 216.[7]

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[7] The Court noted that this common-law liability standard contrasted with "the very loose test of responsibility" that had obtained under the pre-1935 version of the LMRA. *See* 444 U.S. at 217.

By its plain terms, the *Coronado Coal/Carbon Fuel* "authorization/participation/ratification" standard of vicarious liability *excludes* mere "acquiescence" as the basis for the imposition of such liability, as *Carbon Fuel* makes clear:

> Petitioner makes the distinct argument that we should hold the International liable for its *own* failure to respond to the locals' strike. In the face of Congress' clear statement of the limits of an international union's legal responsibility for the acts of one of its local unions, *it would be anomalous to hold that an international is nonetheless liable for its failure to take certain steps in response to actions of the local.* [*Id.* at 217-18 (first emphasis by Court); (second emphasis added).]

CONCLUSION

For the foregoing reasons, the petition for a writ of *certiorari* should be granted.

Respectfully submitted,

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